In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1192

SHEILA M. LYONS,
PETITIONER,

v.

SALVE REGINA COLLEGE and
SHEILA M. MEGLEY, PH.D., Individually and
in Her Capacity as Dean of Students
at Salve Regina College,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

WALTER R. STONE
STONE, CLIFTON & CLIFTON
Attorneys for the Petitioner
No. 4 Benefit Street
Providence, Rhode Island 02904
(401) 421-9138

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

In the
Supreme Court of the United States

OCTOBER TERM, 1978

No.

SHEILA M. LYONS,
PETITIONER,

v.

SALVE REGINA COLLEGE and
SHEILA M. MEGLEY, PH.D., Individually and
in Her Capacity as Dean of Students
at Salve Regina College,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on November 25, 1977.

Citation to Opinion Below

The opinion of the District Court of Rhode Island is reported at 422 F.Supp. 1354 (D.R.I., 1976). The opinion of the Court of Appeals for the First Circuit is reported at 565 F.2d 200 (1st Cir. 1977).

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was made and entered on November 25, 1977, and copies thereof are appended to this petition in the Appendix at p. 9. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Question Presented

In a suit for breach of contract by petitioner, a student attending a private college to enforce terms and conditions of the contract promulgated by the respondents, the District Court found that there had been, as a matter of fact, a breach of the contractual terms as established by respondents and ordered respondents to reinstate petitioner as a student in respondent college, Salve Regina College. The Court of Appeals reversed the decision of the District Court.

The question presented is as follows:

Did the Court of Appeals err in overturning the finding of facts of the District Court which held: under the rules promulgated by respondent, Dean Megley, on January 26, 1976, in her memorandum to petitioner on January 27, 1976, that the Dean of Students was bound by the recommendations of the Grade Appeals Committee?

Constitutional Provisions, Statutes and Rules Involved

The District Court invoked jurisdiction pursuant to 28 U.S.C. §1332 (1970) (diversity of citizenship; amount in controversy exceeding ten thousand ($10,000.00) dollars).

Statement

Petitioner, a fourth year nursing student at respondent college, Salve Regina College, accompanied an ill friend in an ambulance to Boston; and while away for several days, missed three (3) classes and two (2) clinical experiences in an eight (8) week required course. Petitioner claimed that the instructor assured her that the only result of her absence would be that she would receive a grade of "Incomplete" for the course. Petitioner completed the course, took the examination, and later learned that she had received an "F" grade. Petitioner appealed the grade of "F" pursuant to the provisions of the respondent college's Academic Information and Registration Materials for 1975, which provided for a three (3) member Grade Appeals Committee consisting of one (1) Faculty member chosen by the student, one (1) Faculty member chosen by the instructor and one (1) Faculty member acceptable to both the student and the instructor. The Committee's recommendation would be made to the Dean of Students. The Appeals Committee voted two (2) to one (1) that petitioner should be given an "Incomplete" instead of the grade of "F." The Dean overruled the two (2) to one (1) majority and denied petitioner's appeal. As a result of this decision, petitioner was dropped from the nursing program.

In September of 1976, petitioner filed an action in the District Court alleging a cause of action under 42 U.S.C. §1983 (1970). The complaint was amended to invoke the

diversity jurisdiction of the District Court for an action in the nature of breach of contract seeking injunctive relief and money damages. The District Court, in a finding of fact, found that respondent, Dean Megley, on January 26, 1976, promulgated procedural guidelines to be followed by the Committee in its hearing on petitioner's case, in which she stated that the decision of the hearing Committee should be final, subject only to the right of appeal to the Dean of Students, *Lyons* v. *Salve Regina College, et al.*, 422 F.Supp. 1354, 1362 (D.R.I., 1976).

The District Court in addition found further evidence to support its finding that the respondent, Dean Megley, understood herself to be bound to follow the recommendations of the Appeal Committee from a memorandum from respondent, Dean Megley, to petitioner dated January 27, 1976. In this memorandum written before the meeting of the Appeals Committee, respondent, Dean Megley, informed petitioner that she could register conditionally for the final semester and that such registration would be revoked if the Committee's "decision" were unfavorable. Registration would be made final if the Committee's "decision" were favorable. This letter contained no hint that the Dean had the power to overturn the Committee's recommendation. The District Court found it impossible to reconcile this letter with any other conclusion than that the recommendation would be final and binding. Based on this fact, the District Court further found that the intent of the parties was that the word "recommendation" as used in the College Manual and in the Academic Information and Registration Materials for 1975 would mean a recommendation that was binding on the Dean of Students.

The Court found that respondent's action in refusing to abide by the decision of the Appeals Committee constituted a breach of contract. *Lyons* v. *Salve Regina College, et al.*,

422 F.Supp. 1354, 1362 & 1363 (D.R.I., 1976). Respondents appealed the District Court decision.

On November 25, 1977, the Court of Appeals for the First Circuit reversed the District Court decision. Without ever addressing the finding of facts by the trial court as to the meaning of respondent's, Dean Megley, procedural guidelines or respondent's, Dean Megley, memorandum to petitioner dated January 27, 1976, the Appeals Court held:

> "There is nothing in the instant record to indicate that a student at respondent college had any rational basis for believing that the word 'recommendation' meant anything other than its normal, everyday meaning." *Lyons* v. *Salve Regina College, et al.*, 565 F.2d 200, 202 & 203 (1st Cir., 1977).

As a result of the Court of Appeals' decision, petitioner is unable to complete her Board of Examinations for Nursing in the State of Connecticut (see Appendix, p. 33).

Reason for Granting the Writ

The decision below should be reviewed because it erroneously concludes that petitioner had no rational basis for believing that the word "recommendation" meant anything other than its normal everyday meaning without ever considering the factual basis upon which the District Court made its decision. This case involves questions of fact since all parties agree that the relationship between student and college is contractual. *Lyons* v. *Salve Regina College, et. al.*, 422 F.Supp. 1354 (D.R.I., 1976). The District Court having invoked diversity jurisdiction was required to apply the substantive law of Rhode Island. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). There were no cases in the area of either contract law or educational law

in which the Supreme Court of Rhode Island had enunciated the principles of law to be applied by a trial court in resolving a dispute arising out of the relationship between a private academic institution and its students. Because of the non-availability of guidance from the Rhode Island Supreme Court, the District Court undertook to resolve the controversy between the parties as to the nature and extent of a student's rights under the academic administration appellate procedure available at this particular institution on the basis of traditional principles of contract law.

The Court below was of the opinion that the approach which the Rhode Island Supreme Court would adopt in construing the language of a claimed contract between a student and his/her college or university is that prescribed in the opinion of the Court of Appeals for the Tenth Circuit in *Slaughter* v. *Brigham Young University*, 514 F.2d 622 (10th Cir., 1975). There the Court held:

> "The trial court's rigid application of commercial contract doctrine advanced by plaintiff's was in error . . . . .
>
> It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the university to provide some framework into which to put the problem . . . This does not mean that 'contract law' must be rigidly applied in all its aspects, nor is it so adopted . . . . The student-university relationship is unique, and it should not be and and can not be stuffed into one doctrinal category . . . ."

The District Court for the District of Columbia in *Giles* v. *Howard University*, 428 F.Supp. 603, 605 (D.D.C., 1977), held:

> "Contract interpretation is a function of the court where, as here, no extrinsic evidence is necessary to determine an agreement's meaning . . . Since it is apparent that this is not an integrated agreement, the standard is that of reasonable expectation — what meaning the party making the manifestation, the university, should reasonably expect the other party to give it . . ."

The District Court setting as the trier of facts found that respondent's, Dean Megley, promulgated guidelines to the Grade Appeals Committee on January 26, 1976, as well as her memorandum to petitioner on January 27, 1976, constituted a clear manifestation on the part of respondent, Dean Megley, to be bound by the decision of the Committee. *Lyons* v. *Salve Regina College, et. al.*, 422 F.Supp. 1354, 1363 (D.R.I., 1976). The Court below should not have reversed the trial court setting as the trier of facts unless its decision was clearly erroneous and plainly wrong. *Martin* v. *Vector Co., Inc.*, 498 F.2d 16 (1st Cir., 1974).

While petitioner raises substantial and important questions concerning the contractual relationships between students and private colleges/universities in this prayer for certiorari which may raise issues of first impression for this court, petitioner seeks only review of the narrow issue of whether or not, based on the factual issues presented, petitioner was entitled to relief as granted by the District Court. This issue is certainly not moot. While petitioner was reinstated in school per the District Court order, she is now being barred from taking the Nursing Licensing Examination based on the Court of Appeals decision (see Appendix, p. 33). Considering the money and time invested by petitioner and her family in striving to achieve the professional goal of Nursing, this Court truly becomes a court of last resort.

Conclusion

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

WALTER R. STONE
STONE, CLIFTON & CLIFTON
Attorneys for the Petitioner
No. 4 Benefit Street
Providence, Rhode Island 02904
(401) 421-9138

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1083

SHEILA M. LYONS,
PLAINTIFF, APPELLEE,
v.
SALVE REGINA COLLEGE and
SHEILA M. MEGLEY, Ph.d.,
Individually and in her capacity
as Dean of Students at Salve Regina College,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
CAFFREY,* *District Judge.*

Peter J. McGinn, with whom *Norman G. Benoit* and *Tillinghast, Collins & Graham* were on brief, for appellants.
Walter R. Stone, with whom *Stone & Clifton* and *Joanne E. Mattiace* were on brief, for appellee.

November 25, 1977

CAFFREY, *District Judge*

This is an appeal from a final Order of the District Court which required defendant-appellants to reinstate plaintiff-appellee Sheila Lyons as a student in Salve Regina College for the purpose of obtaining a nursing degree.

Plaintiff filed an action in the District Court alleging

*Of the District of Massachusetts, sitting by designation.

a cause of action under 42 U.S.C. §1983 (1970) in September of 1976. The complaint was amended to invoke the diversity jurisdiction of the District Court for an action in the nature of breach of contract. It is undisputed that plaintiff, while a student at the College, received a grade of "F" in a course captioned "Nursing 402A." Because of this grade, under the rules of the College, she could no longer continue her studies towards a degree in nursing, and, in fact, she graduated from the College with a degree in the field of psychology. The relief sought by plaintiff on the basis of the amended complaint was an order requiring the College to change her grade in Nursing 402A from an "F" to an "Incomplete," reinstatement for the purpose of completing the courses required for a nursing degree, and money damages.

Briefly stated, plaintiff's contract theory was that the College Manual and Academic Information booklet constituted a contract between plaintiff and the College, and that the booklet contained provisions for the selection of a Grade Appeals Committee (Committee), for the hearing of a student's appeal concerning a disputed grade by the Committee, and for the recommendation of a course of action to the Dean of the College by the Committee. The ruling below was that the recommendation of the Committee was binding upon the Dean and that the Dean's failure to follow the recommendation, as found by the District Court, constituted an actionable breach of contract by the College.

The text of the pertinent parts of the College's Academic Information and Registration Materials for 1975 and 1976 is set out in the opinion of the District Court in *Lyons* v. *Salve Regina College,* 422 F. Supp. 1354, 1358 (D.R.I. 1976), and need not be fully repeated here. The critical portion of that document appears under the heading "Grade Appeal Process" and provides, "After both

cases [the student's and the teacher's] are presented to the three-member grade appeals committee, the recommendation of the committee is made to the Dean of Students/Associate Dean of the College."

After the hearing, the three faculty members who constituted the Grade Appeals Committee could not agree on a unanimous recommendation to Dean Megley. On the contrary, they recommended as follows:

> Member Foglia: "The 'F' grade should not be altered. The student should apply to the nursing department for reinstatement to the program."
>
> Member Trimbach: "It is my recommendation that Sheila Lyons be awarded the grade of Incomplete in Nursing 402A, until the work missed early in the Fall of 1975 is completed. The specific terms of this arrangement should be agreed upon by both parties."
>
> Member Carlin: "It is recommended therefore that Sheila Lyons be granted an 'Incomplete' for the course in question and that she be allowed to make up the clinical classes and seminars that she missed."

Dean Megley determined herself not bound by these diverse recommendations and, in effect, overruled the two-to-one majority which favored the entry of the grade of "Incomplete" in lieu of the "F" awarded by the instructor, Ms. Hull. The crucial question before us is whether the District Court erred in construing the words "recommendation of the committee . . . to the Dean" as binding upon the Dean. There is nothing in either the College Manual or the College Academic Information and Registration Materials which in any way refers to the meaning of the word "recommendation" in the quoted language, nor is there any provision which indicates directly or indirectly

whether the Dean is bound by or free to disregard or alter the "recommendation" of the Committee.

Because the District Court entertained this case on the basis of its diversity jurisdiction, it was required under familiar principles to apply the substantive law of Rhode Island. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Our research has found no case in the area of either contract law or educational law in which the Supreme Court of Rhode Island has enunciated the principles of law to be applied by a trial court in resolving a dispute arising out of the relationship between a private academic institution and its students. Because of the non-availability of guidance from the Rhode Island Supreme Court, the District Court undertook to resolve the controversy between the parties, as to the nature and extent of a student's rights under the academic administrative appellate procedure available at this particular institution, on the basis of traditional principles of contract law. The Court proceeded on the assumption that the College Manual and the College Academic Information and Registration Materials set out the terms of an ordinary commercial contract between Salve Regina College and the members of its student body including plaintiff. We are of the opinion that the approach which the Rhode Island Supreme Court would adopt, in construing the language of a claimed contract between a student and her college or university, is that prescribed in the opinion of the Court of Appeals for the Tenth Circuit in *Slaughter* v. *Brigham Young University*, 514 F.2d 622 (10th Cir. 1975). There the Court ruled:

> The trial court's rigid application of commercial contract doctrine advanced by plaintiff's was in error....
>
> It is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the university

> to provide some framework into which to put the problem. . . . This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. . . . The student-university relationship is unique, and it should not be and can not be stuffed into one doctrinal category. . . .
>
> *Id.* at 626.

While arguably the language should be construed against the College as the author thereof, nevertheless we believe it should be kept in mind, as was pointed out by the District Court for the District of Columbia in *Giles* v. *Howard University*, 428 F. Supp. 603, 605 (D.D.C. 1977), that: "Contract interpretation is a function of the court where, as here, no extrinsic evidence is necessary to determine an agreement's meaning. . . . Since it is apparent that this is not an integrated agreement, the standard is that of reasonable expectation — what meaning the party making the manifestation, the university, should reasonably expect the other party to give it. . . ."

There is nothing in the instant record to indicate that a student at Salve Regina College had any rational basis for believing that the word "recommendation" meant anything other than its normal, everyday meaning. It is not a word of art, nor has it acquired any secondary meaning in academic circles which can be discerned from the instant record.[1] Nothing in the student manual suggests that a recommendation by the Committee could reasonably be thought to be anything more than an expression of the Committee's opinion as to the preferred course of conduct to be followed by the Dean in resolving the issue between

---

[1] Even if the word "recommendation" had acquired a localized, albeit unusual, secondary meaning in the academic community at Salve Regina College, the record is barren of any evidence suggesting, much less proving, that plaintiff relied on such a meaning to her detriment in determining her course of action.

the teacher and the student. Nothing in this document affords any basis for a reasonable expectation that it was mandatory upon the Dean to follow the Committee's views. Consequently, we rule that it was error for the District Court, in effect, to convert a recommendation of the Committee into a mandatory order from the Committee to the Dean.

In view of the above ruling, only brief mention will be made of two other points raised by appellant, namely, lack of diversity of citizenship and lack of an amount in controversy in excess of $10,000. Suffice it to say that, while the evidence was both sharply conflicting and rather slim on both of these points, the findings of fact by the District Court cannot be said to be plainly wrong on this record and will, therefore, not be disturbed by this Court.

Reversed.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No.: 76-0390

SHEILA M. LYONS

v.

SALVE REGINA COLLEGE, et al.

OPINION

PETTINE, *Chief Judge*

In this action, plaintiff Sheila Lyons, a former nursing student at defendant Salve Regina College, seeks specific relief and damages for an alleged breach of contract. According to plaintiff, the defendant breached its contract by taking actions unauthorized by, and contrary to, the rules of the College. The parties are agreed that these rules, promulgated by the College and accepted for consideration by the plaintiff, constituted a contract. As a result of this alleged breach, plaintiff claims that the was improperly forced out of the Nursing Department, graduating with a psychology degree instead.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1332 (1970) (diversity of citizenship; amount in controversy exceeding $10,000.).

I

Defendants, at the time this case was heard, moved the Court to dismiss the complaint for lack of subject matter jurisdiction, contending that plaintiff was in fact a Rhode Island resident and that the amount in controvery did not exceed $10,000. exclusive of interest and costs. The Court reserved judgment on this motion, pending the hearing, at which the parties offered evidence on both the jurisdictional questions and the merits. The Court is now

prepared to rule on defendants' motion to dismiss and the same is hereby denied for the reasons that follow.

Defendants' contention that the Court is without jurisdiction because the amount in controversy is less than $10,000 cannot be sustained. While the burden of establishing the jurisdictional amount in this case is on the plaintiff, that burden is not heavy. She must simply show that it does not appear to a legal certainty that the amount in controversy is less than $10,000. *Gibbs* v. *Buck*, 307 U.S. 66 (1939); *Murray* v. *Vaughan*, 300 F.Supp. 688, 694 (D.R.I. 1969). Absent evidence of bad faith the determination is made by examining the face of plaintiff's complaint. *Horton* v. *Liberty Mutual Insurance Co.*, 367 U.S. 348, 353 (1961).

Defendants argue that because plaintiff testified that her father paid her tuition at Salve Regina College, she is not monetarily damaged by the College's alleged breach of contract and therefore has not brought to this Court a controversy regarding an amount in excess of $10,000. This argument mistakes the basis upon which the "amount in controversy" is determined. The proper basis is the "value of the right sought to be gained by the plaintiff". *Hedberg* v. *State Farm Mutual Automobile Insurance Co.*, 350 F.2d 924, 928 (8th Cir. 1965) (per Blackmun, J.). Here plaintiff alleges that the College's action has "seriously damaged plaintiff's opportunities for higher education and employment as a Nurse" and seeks a mandatory injunction reinstating her in the nursing program at the College. She has testified that she desires to pursue a career as a nurse. If unsuccessful in her efforts to resolve her problems, her testimony indicates that she will find it difficult if not impossible to transfer to another school and will have to begin her nursing studies all over again, entailing expenses in excess of $10,000. In addition, since leaving Salve Regina, plaintiff has sought employment in

lesser paying jobs in the health care field. She has been thus far unable to gain employment, but if she does, the Court takes judicial notice that she will earn less money in the health care field without a nursing degree than she would if she had one. *Cf. Walsh* v. *Local Board No. 10*, 305 F.Supp. 1274, 1276 (S.D.N.Y. 1969). Absent any relevant evidence in support of defendant's position, the Court will accept plaintiff's good faith allegation that the amount in controversy exceeds $10,000.[1] *See Silva* v. *East Providence Housing Authority*, 390 F.Supp. 691, 694 (D.R.I. 1975).

Defendants also seek dismissal on the grounds that plaintiff is in fact a resident of Rhode Island and that the diversity required for this Court's jurisdiction under 28 U.S.C. §1332 is therefore lacking. The Court does not agree. Out-of-state students are generally "viewed as temporary residents who are located in the state only for the duration of and for the purposes of their studies". 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure §3619 (1975). It is therefore usually presumed that they retain their domicile at their former place of abode. *See Campbell* v. *Oliva*, 295 F.Supp. 616, 619 (E.D. Tenn. 1968); *Mallon* v. *Lutz*, 217 F.Supp. 454, 456 (E.D. Mich. 1963); *Bainum* v. *Kalen*, 325 A.2d 392, 398 (Md. 1974). In the present case, plaintiff has testified that she intends to return to Connecticut when she completed school. As evidence of her ties to that state, she has submitted a Con-

[1] In addition to the value of the injunctive relief, which the Court cannot say is legally certain to be less than $10,000, plaintiff seeks an additional $10,000 in damages. The total relief sought thus clearly meets the jurisdictional amount required by 28 U.S.C. §1332. Defendants have not cited any authority indicating that the money damages sought cannot be awarded under Rhode Island law and the Court must therefore accept the *ad damnum* for purposes of deciding whether the jurisdictional amount has been met. *See* 14 C. Wright, F. Miller and E. Cooper, Federal Practice and Procedure §3702 at 394-395 (1976).

necticut driver's license, a Connecticut "Majority Card", and a Connecticut voting card.[2]

On the other hand, defendants point to several facts claimed to be inconsistent with temporary residence. Plaintiff placed advertisements in the Newport (R.I.) *Daily News* seeking "temporary or permanent" employment. In addition, defendant Megley has testified, and plaintiff does not deny, that plaintiff told her that she wanted to stay in Rhode Island. Finally, defendants have shown that plaintiff was registered to vote in Rhode Island and changed her registration to Connecticut only after she took steps to begin this lawsuit.

Notwithstanding this evidence, the Court finds that plaintiff is in fact a Connecticut resident. This finding is based on plaintiff's statement regarding her intentions, which the Court finds entirely credible, *cf. Campbell* v. *Oliva, supra,* 295 F.Supp. at 678, and the supporting evidence.

This finding is not altered by plaintiff's seemingly inconsistent acts and statements. In view of employers, well-known hesitancy to accept as employees persons who do not offer assurances that they will be permanent, plaintiff's advertisement seeking "temporary or permanent" employment is not conclusive on the issue of domicile. Plaintiff's statement to defendant Megley that she wished to remain in Rhode Island was made in the course of a discussion about transferring to an out-of-state nursing school and the Court does not understand it to mean anything more than that plaintiff wished to complete her schooling here. With regard to plaintiff's temporary registration as a Rhode Island voter, the Court accepts plaintiff's explanation that she registered in Rhode Island because she was anxious to vote in the presidential primary. In brief, no evidence has been introduced that effectively rebuts plaintiff's statement that her present intention is to return to Connecticut when her temporary sojourn is Rhode Island is over. This is sufficient to establish diversity and the Court accordingly turns to the merits in this controversy.

[2] Defendants argue that since plaintiff has graduated she is no longer a student and should not be able to avail herself of the student presumption. The Court is somewhat astonished at defendants' temerity in raising this point in view of the fact that it is defendants' refusal to re-admit plaintiff in the nursing program that is entirely responsible for her present non-student status. In any case, defendants have submitted evidence to rebut any presumption of foreign domicile and the Court has weighed that evidence along with that of plaintiff's in reaching its conclusion.

II

The issues in this case center largely around the state of mind of the parties. There is little dispute as to external events.

In September 1975, plaintiff, Sheila Lyons, entered into her fourth and final year as a nursing student at defendant Salve Regina College. She had been a successful student up until that time, receiving A's and B's in nearly all of her courses and serving as president of her class. Among the courses for which Lyons registered was a required clinical and theoretical course, designated as Nursing 402A. The course ran from early September until the end of October.

On September 29, 1975, Lyons went to Boston by ambulance, accompanying an ill friend to Massachusetts General Hospital. She returned to class on October 2, having missed three classes and two clinical experiences, and thereupon consulted with her instructor, Maureen Hull. Lyons claims that Ms. Hull assured her that the only result of her absence would be that she would receive a grade of "Incomplete" for the course. Ms. Hull claims that no such assurances were given. In any case, Lyons continued to attend classes, submitted papers, and took the final exam, even though she could have withdrawn from the course

without incurring a grade of "F" had she chosen to do so before the last day of class.

The course ended in late October, but the grades were not immediately promulgated. When they were, Lyons learned that she had received an "F" rather than the allegedly promised "Incomplete". On December 17, 1975, Lyons formally appealed the grade of "F". This action was taken pursuant to the following provisions of the Salve Regina College Academic Information and Registration Materials for 1975:

GRADE APPEAL

Students have the right to a formal grade appeal after the grade has been submitted and recorded. The student must, however, attempt to resolve the matter with the instructor before the process is set in motion by the Dean of Students.

GRADE APPEAL PROCESS

If the student fails to resolve the appeal with the instructor to the satisfaction of the student, the student may request that a grade appeal committee be established. To initiate the process the student contacts the Dean of Students office. The Dean of Students sets up the process by which:

1. The student chooses a faculty member to represent his/her case.
2. The instructor chooses a faculty member to represent his/her case.
3. A third faculty member mutually acceptable to the student and to the instructor serves as chairman.

After both cases are presented to the three-member grade appeals committee, the recommendation of the committee is made to the Dean of Students/Associate Dean of the College.[3]

[3] Substantially similar language is contained in the 1975-1976 College Manual.

In February 1976, the Appeal Committee met and took testimony from Lyons and from Ms. Hull, her instructor. After hearing all the evidence, the Committee voted as follows:

1. Member Foglia: "The 'F' grade should not be altered. The student should apply to the nursing department for reinstatement to the program."
2. Member Trimbach: "It is my recommendation that Sheila Lyons be awarded the grade of Incomplete in Nursing 402A, until the work missed early in the Fall of 1975 is completed. The specific terms of this arrangement should be agreed upon by both parties."
3. Member Carlin: "It is recommended therefore that Sheila Lyons be granted an 'Incomplete' for the course in question and that she be allowed to make up the clinical classes and seminars that she missed."[4]

On February 11, 1976, Defendant Megley, the Associate Dean of the College, to whom the Committee's recommendations were submitted, overruled the 2-1 majority and denied Lyons' grade appeal. As a result of this decision, Lyons was dropped from the nursing program. She was, however, permitted to change her major to psychology and remain in the College.

III

Both sides are agreed that they were parties to a valid contract, whose terms and conditions are set forth in the College Manual and in the 1975 Academic Information and Registration Materials.[5] These documents provide for

[4] Defendants' Exhibit K.

[5] Defendants would classify plaintiff as third-party donee beneficiary of a contract between the College and plaintiff's father, who paid the tuition. Assuming *arguendo* that this is true, there is no claim that plaintiff's rights as third-party beneficiary would be any different in the present case than if the contract runs directly between her and the College. It is a "well-settled rule that relations between a student and a private university are a matter of contract". *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (dictum).

the grade appeal process whose ultimate outcome Lyons is now challenging. Hence, the issue before the Court is an exceedingly narrow one: did Dean Megley's action in overturning the decision of the Grade Appeal Committee thereby reinstating Lyons' "F" in Nursing 402A, constitute a breach of contract in that it failed to follow the guidelines set forth in the College Manual and in the 1975 Academic Information and Registration Materials?

Notwithstanding defendants' claims to the contrary, there is no broad issue of academic freedom to be decided here. The Court most emphatically eschews any competence to judge the accuracy of Ms. Hull's assessment of Lyons' academic performance, the justness of the Committee's resolution of the appeals, or the sufficiency of Dean Megley's reasons for overriding the Committee. The Court could not pass judgment on such matters, sensible as it is that they implicate serious questions of academic freedom. On the other hand, the Court cannot refuse to decide whether an enforceable promise has been broken, simply because the contract is drawn between school and student, particularly when both parties agree that they stand in a contractual relationship.[6] To that decision the Court now turns.

The Court cannot determine if there was a breach until it determines precisely what the contract provided. Here, the Court must ascertain whether the parties intended

[6] The Court was surprised that counsel for the defendants raised the spectre of academic freedom in this case, and has waited in vain for some enlightenment as to where academic freedom is implicated *in the slightest degree*. Unfortunately, no such enlightenment has been forthcoming. If counsel has serious First Amendment arguments to make, they should be made so that the Court can fairly assess them. If such issues are raised only as straw men, they are better not raised at all. Nevertheless, the Court has canvassed the issue itself, and is satisfied that it can be resolved entirely as a contract matter without eroding in any way the autonomy of private education. *Cf. Berrios* v. *Inter American University*, 535 F.2d 1330 (1st Cir. 1976).

that the recommendations of the Appeal Committee to Dean Megley should be binding on her and the College, or whether Dean Megley was free to ignore those recommendations if she chose. *See* text accompanying note 3, *supra.*

According to Plaintiff, the evidence shows that the College, which drafted the documents containing the disputed language, made clear by its conduct (in the person of Dean Megley) that the recommendation was to be binding and that Lyons was wrongfully deprived of a grade of "Incomplete", as voted by the committee.

Defendants, on the other hand, deny that the written contract ever envisaged, or that Dean Megley ever understood that the Committee's recommendation would be anything more than advisory. The Dean had the right to choose not to follow the Committee's advice, defendants argue, and therefore Lyons has no legal basis upon which to complain.

Defandants further submit that it is not open to the Court to examine the conduct of the parties in order to determine the proper construction of the contract. Defendants contend that the word "recommendation" means a course of action that is merely advised or exhorted, not one that is required. According to defendants, because the meaning of recommendation is so clear, under Rhode Island law this Court is bound by the "plain meaning" rule: where contractual language is ambiguous on its face, a court may not look beyond the four corners of the instrument in order to ascertain the intent of the parties.[7]

[7] This rule, in its extreme form, has been sharply criticized:

> A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.
>
> *Pacific Gas & Elec. Co.* v. *G. W. Thomas Drayage & R. Co.*, 442 P.2d 641, 644 (Cal. 1968) (Traynor, C.J.)

There are several difficulties with this position. It is true that the Rhode Island Supreme Court has recently stated that "the clear and unambiguous language set out in a written instrument is controlling as to the intent of the parties thereto and governs the legal consequences of the contract provisions", *Theroux* v. *Bay Associates, Inc.*, 339 A.2d 266, 268 (R.I. 1975). However, this proposition does not answer the question of how the initial determination of the ambiguity *vel non* of the contract language is to be made.[8]

The *Theroux* court cites to *Flanagan* v. *Kelly's System of New England, Inc.*, 109 R.I. 388, 286 A.2d 249 (1972) and to *Hill* v. *M.S. Alper & Son, Inc.*, 106 R.I. 38, 256 A.2d 10 (1969). These cases elucidate the Supreme Court's statement in *Theroux*. In *Flanagan*[9] the court, in determining that the expression "turn over" was not ambiguous, looked at the dictionary meaning, the meaning of the term in various specialized settings, *and at the subsequent conduct of the parties*. 106 R.I. at 393-394; 286 A.2d at 251-252. Moreover, the *Flanagan* court approved the approach

---

The better rule

> requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties . . . . If the court determines after considering this evidence, that teh language of a contract, in the light of all the circumstances, is "fairly susceptible of either one of the two interpretations contended for . . .", extrinsic evidence relevant to prove either of such meanings is admissible. *Id.* at 645-646. *See Hohenstein* v. *S.M.H. Trading Co.*, 382 F.2d 530, 531-532 (5th Cir. 1967); *Hamilton* v. *Wosepka*, 154 N.W.2d 164, 167-172 (Iowa 1967).

[8] *Compare Pacific Gas & Elec. Co.* v. *G. W. Thomas Drayage & R. Co.*, 442 P.2d 641, 646 n.8 (Cal. 1968):

> Extrinsic evidence has often been admitted in such cases on the stated ground that the contract was ambiguous . . . . This statement of the rule is harmless if it is kept in mind that the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning.

[9] *Flanagan* was decided under Florida law but the Supreme Court indicated that Rhode Island law was identical. 106 R.I. at 392-393; 286 A.2d at 251.

taken in the *Hill* case, in which Mr. Justice Joslin laid out the following rules for the interpretation of contracts.

> In interpreting that instrument it is basic that the intention of the parties must govern if that intention can be clearly inferred from its terms and can be fairly carried out consistent with settled rules of law. *Hatch* v. *Sallinger*, 47 R.I. 395, 133A. 621; *Newport Water Works* v. *Taylor*, 34 R.I. 478, 83A. 833; *Reynolds* v. *Washington Real Estate Co.*, 23 R.I. 197, 49A. 707; *Anthony* v. *Comstock*, 1 R.I. 454. In ascertaining what the intent is we must look at the instrument as a whole and not at some detached portion thereof. *Shuster* v. *Sion*, 86 R.I. 431, 136 A.2d 611. And, although there is no ambiguity, we will nonetheless consider the situation of the parties and the accompanying circumstances at the time the contract was entered into, not for the purpose of modifying or enlarging or curtailing its terms, but to aid in the interpretive process and to assist in determining its meaning. Restatement of Contracts §235(d); see *Swinburne* v. *Swinburne*, 36 R.I. 255, 90A. 121; *Wesley* v. *M.N. Cartier & Sons*, 30 R.I. 403, 75A. 626; *Deblois* v. *Earle*, 7 R.I. 26. If, after applying those and the other established standards of interpretation, the meaning still remains uncertain, we will prefer an interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention, rather than one which leaves a part of those manifestations unreasonable, unlawful or no effect. Restatement of Contracts §236(a); see *Wall & Co.* v. *Imperial Printing & Finishing Co.*, 165 A. 898 (R.I.; *Gross* v. *Clark*, 43 R.I. 389, 113 A. 115.

Justice Joslin's language in *Hill* and the Rhode Island Supreme Court's mode of analysis in *Flanagan* make it clear that Rhode Island law does not take the rigid ap-

proach to contract construction suggested by defendants even where a word or phrase in a contract, by itself, would appear to have a straightforward meaning.

Even if the Court were to accept plaintiff's version of the plain meaning rule, this case is not one where the contractual language is free from ambiguity. While a recommendation is concededly often understood to be hortatory or advisory only, this is by no means the only possible construction In *Newport Hospital* v. *Harvey*, 49 R.I. 40, 43, 139 A. 659, 661 (1927), the Rhode Island Supreme Court recognized that in wills and trusts "to recommend" can be the equivalent of "to command", "clothed merely in language of civility". Similarly, it has been held in a criminal case that a trial judge who told a jury that they were permitted to accompany their verdict with a "recommendation to mercy" erred when he failed also "to inform them in plain language that such recommendation is without binding effect on the court in the matter of sentence". *State* v. *Ruzzo*, 63 R.I. 138, 144; 7 A2d 693, 695 (1939). Clearly, such a holding would be unnecessary if the Supreme Court found the word "recommendation" to be without ambiguity.

These examples of the ambiguous use of "recommendation" are taken from contexts that differ factually from the case at bar. They are nevertheless most persuasive of the point at issue and reinforce the Court's conclusion that it must look beyond the words of the contract, not to alter its meaning but to determine what effect the parties intended the Appeals Committee's recommendation to have.

In resolving this factual question, *cf. Minor* v. *Narragansett Machine Co.*, 71 R.I. 108, 116; 42 A.2d 711, 715 (1948), the practical construction placed on the disputed terms by the parties themselves "will ordinarily be resorted to by the court to ascertain their true intent". *Coe* v. *Zwetchkenbaum*, 89 R.I. 358; 153 A.2d 517, 520 (1959); *Cook* v. *Dunbar*, 66 R.I. 266, 274; 18 A.2d 658, 662 (1941); *see* Restatement of Contracts §235(e) (1932).

In the present case, Dean Megley, the person charged by the College Manual with receiving and acting upon the recommendation of the Appeals Committee, testified that she understood that the Committee's recommendations would be suggestions only and in no way binding. However, the Court finds that this testimony is totally inconsistent with her other statements and writings.

On January 26, 1976 Dean Megley promulgated procedural guidelines to be followed by the Committee in its hearing on the Lyons case.[10]

In these procedures she stated that "[t]he decision of

[10] The full text of these is as follows:

HEARING — COMMITTEE PROCEDURES

GRADE APPEAL

1. The faculty member should be informed of the reasons for the grade appeal with sufficient particularity, and in sufficient time, to insure opportunity to prepare a response.
2. The burden of proof rests upon the student making the appeal.
3. The faculty member should be given an opportunity to testify and to present evidence and witness. The faculty member should have an opportunity to hear and question adverse witnesses. In no case should the committee consider statements against the faculty member unless the faculty member has been advised of their content and of names of those who made them, and unless the faculty member has been given the opportunity to rebut unfavorable inferences which might otherwise be drawn.
4. All matters upon which the decision may be based must be introduced into evidence at the proceedings before the committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.
5. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.
8. The decision of the hearing committee should be final, subject only to the right of appeal to the Dean of Students. [It must be noted no appeal was taken in this case]
9. The committee's decision along with all records is forwarded to the Dean of Students.
10. The Dean of Students notifies both parties of the decision of the committee.

(Defendants' Exhibit I).

the hearing committee should be final, subject *only* to the right of appeal[11] to the Dean of Students". (emphasis added). This would seem to the Court to mean just what it says and to be strong evidence that the parties[12] understood that the word "recommendation" as used in the contract meant a recommendation that was binding unless appealed. The entire document makes it quite clear that "should" is used throughout the text in place of "shall" and is mandatory, not hortatory. Otherwise, other phrases used in the procedures, such as "[i]mproperly acquired evidence should not be admitted", are devoid of sense. The Court finds that the January 26 memorandum set forth at note 10, *supra,* indicates that Dean Megley understood herself to be bound to follow the "recommendations" of the Appeals Committee.

Additional evidence, in the Court's mind conclusive, to support this finding is provided by a memorandum from Dean Megley to Sheila Lyons dated January 27, 1976.[13]

---

[11] This "appeal" should not be confused with the "grade appeal" decided by the committee, whose recommendations are passed on to Dean of Students. If the Student is dissatisfied with the recommendation that the Committee makes to the Dean of Students after it has heard the grade appeal, then the student can "appeal" the Committee's recommendation as to the proper disposition of the "grade appeal" to the Dean of Students. An "appeal" would lie if the student were deprived of due process, if there were new evidence, or if it were contended that the Committee's resolution of the "grade appeal" was unreasonable. *See* Defendants' Exhibit H. There is no indication that there was any procedure for appeal by the faculty member and I find that no such procedure was envisaged.

[12] There is no contention that plaintiff, the other party to the contract, ever understood that the decision would be anything other than final. Thus, in referring to the intent of the parties, the Court is referring to the intent of defendants, which alone has been put at issue.

[13] MEMORANDUM

To: Sheila Lyons
FROM: Dr. Megley
RE: Formal Grade Appeal

The committee to hear your grade appeal has been set up. Its members are Ann Foglia (faculty choice), Charles Trimbach

In this memorandum, written before the meeting of the Appeals Committee, Dean Megley informed Lyons that she could register conditionally for the final semester and that such registration would be revoked if the Committee's "*decision*" were unfavorable. Registration would be made final if the Committee's "*decision*" were favorable. This letter contains not a hint that the Dean has the power to overturn the Committee's recommendation.[14] The Court finds it impossible to reconcile this letter with any other conclusion than that the recommendation would be final and binding. Therefore, the Court finds that Dean Megley,

---

(student choice), and David Carlin (the faculty party named by both to serve on the committee). I met with them yesterday to discuss procedure. Charles Trimbach will contact you concerning this process.

In the meantime, I must alert you to the fact that I have authorized a conditional registration in Nursing 406. However, *should the committee reach an unfavorable decision* you will be held to the following guideline of the Nursing Department:

"Any student who gets a D (or below) in either theory or clinical in a Nursing course would not be allowed to continue in the Nursing program."

and your registration will be dropped. In short, your registration depends upon a favorable outcome of your appeal.

Please be aware that your registration in Nursing 406 is not official until I lift the "conditional" I will do this when and if the appeal committee *reaches a favorable decision.*

Once again, I ask that you refrain from public comment until the appeal is processed. (Emphasis added).

[14] After reinstating Lyons' "F", Dean Megley indicated that she never intended to be bound by the Committee's recommendation, that the decision was hers alone. However, the Court finds the pre-hearing documents of January 26 and January 27 convincing and does not accept this post factum explanation. Likewise, the Court concludes that Dean Megley's implication, *see* Defendants' Exhibit "P", that only a unanimous Committee recommendation would be binding on her, is inconsistent with her pre-hearing instructions to the Committee, *see* Defendants' Exhibit H. Absent explicit language to the contrary, the only reasonable inference to be drawn from that document is that a "decision of the committee" would result from a majority vote. Unanimity became a possible requirement only after the decision of the Committee, to which Dean Megley understood herself bound, turned out to be erroneous in the Dean's view.

before the hearing was held, understood the recommendation of the Appeals Committee to be final. Based on this fact, the Court further finds that the intent of the parties was that the word "recommendation" as used in the College Manual and in the Academic Information and Registration Materials for 1975 would mean a recommendation that was binding on the Dean of Students.

It follows that defendants' action in refusing to abide by the decision of the Appeals Committee constituted a breach of contract.[15] In making this finding, the Court is not, as defendants contend, arbitrarily imposing the legal technicalities of a commercial transaction upon what is essentially an academic dispute. Rather the Court is simply holding that the College, as any other promissor, must abide by procedures to which it has bound itself and its students, until such time as it sees fit to change those procedures.[16]

---

[15] There is no suggestion that Lyons waived her rights under the contract by transferring her major to psychology. Nor would the facts support such a theory. When her appeal was denied she was faced with the unpleasant prospect of applying for re-instatement, thus arguably conceding the validity of the challenged procedure, or making the best of a bad situation by accepting a degree in psychology rather than no degree at all. There is no evidence that Lyons intended to waive her rights under the contract, by which in this case amount to a right to continue in the nursing department absent a grade of "F".

[16] The Court's holding that Dean Megley's subsequent conduct makes clear that the parties contracted for binding recommendation, makes it unnecessary to reach the question of whether the appeals procedures set up by Dean Megley, *see* note 10 *supra*, amounted to a modification or novation of a pre-existing contract. It is also unnecessary to decide whether Dean Megley was empowered to make such a modification or whether Lyons authorized her representative on the Appeals Committee, Charles Trimbach, to assent to any modification.

There is no question, of course, that the College *could*, if it so chose, now re-write the rules to provide Dean Megley with an automatic right of reversal of any hortatory recommendation of the Grade Appeals Committee.

The Court notes that the Grade Appeal procedure had apparently never been used prior to the Lyons case, and has not been invoked subsequently.

IV

Plaintiff seeks specific performance of the College's contractual obligation to follow the binding recommendation of the Committee, and thus to award her the grade of "Incomplete" in Nursing 402A. In addition she seeks reinstatement in the nursing program, waiver of tuition, and substantial money damages.[17]

The Court is prepared to order the award of the grade of "Incomplete" at this time. Furthermore, reinstatement is the appropriate remedy in this type of case; damages cannot make plaintiff whole. *See Slaughter* v. *Brigham Young University*, 514 F.2d 622, 627, (10th Cir. 1975); *Anthony* v. *Syracuse University*, 223 N.Y.S. 796, 806 (Sup. Ct. 1927). Although this case is unusual because plaintiff has already received a degree from the College, reinstatement would nevertheless seem to be proper. The purpose of reinstatement, like any other contract remedy, is to put plaintiff in the same position she was in before the breach of contract occurred, insofar as a court can do this. In the present case, if the College had kept its bargain, Lyons would have had the opportunity to take such additional courses as would have permitted her to graduate with a major in nursing.

This is what Lyons bargained for when she enrolled in Salve Regina College; she did not bargain for a degree in psychology, nor is there any evidence that she accepted such a degree for any reason besides mitigation of damages. Therefore, it would appear that the College will not have fulfilled its contractual obligation to Lyons until it

---

[17] In conference with the Court it was agreed that the motion for temporary relief be passed and that the matter be heard on motion for permanent injunction. The parties did not resolve if and when the Court should determine the questions of tuition waiver and damages. Since no evidence on either of these two points was presented the Court will entertain arguments as to whether or not the same are still open.

gives her the opportunity to meet its requirements for a nursing major. *Cf. Slaughter* v. *Brigham Young University, supra* at 627.

The parties will agree upon the appropriate order and submit the same to the Court.

(s) RAYMOND J. PETTINE, *Chief Judge*
November 19th, 1976

APPENDIX C

December 27, 1977

Ms. Anne F. McGuigan
Chief Nursing Examiner
Board of Examiners for Nursing
79 Elm Street
Hartford, Connecticut 06115

Dear Ms. McGuigan:

In response to your letter of November 28, 1977, I would like to advise you of the essential components of the case cited.

Sheila Lyons was graduated in May of 1976 from Salve Regina College with a Bachelor of Arts degree with a major in Psychology. She had previously been a student majoring in Nursing, but had received an "F" in a required Nursing course. Because of department policy, Miss Lyons was not allowed to continue in the Nursing program. She did not follow stated procedure to seek reinstatement in the Nursing Program. In November of 1976, the United States District Court for the District of Rhode Island ordered Salve Regina College to:

a) Change the "F" grade to "Incomplete"
b) Provide the opportunity for Miss Lyons to complete the Nursing major.

Salve Regina College appealed this order. While the appeal was pending, Miss Lyons essentially completed the required Nursing courses (one at Rhode Island College and two at Salve Regina College by May of 1977), but no new degree was awarded by Salve Regina College.

On November 25, 1977, the United States Court of Appeals for the First Circuit reversed the ruling of the presiding justice, the Honorable Raymond J. Pettine, U.S. Dis-

trict Judge. I am enclosing a summary of the order should you wish to review it.

Therefore, to summarize for you:

1. The Nursing Department at Salve Regina College, following its written policy, as established by Faculty vote on May 24, 1973, indicated to Sheila Lyons that:

a) She was not a candidate for continuing in the Nursing Program because:

I. she had received an "F" in a required course, and

II. she had never followed a written procedure to request reinstatement into the department.

2. Although Miss Lyons completed required courses in the Nursing major under order of Judge Pettine, she was never considered a reinstated student in the department, nor recommended by the faculty for the awarding of a degree with a major in Nursing.

Miss Lyons is not now listed as a graduate of the program leading to a Bachelor of Science degree with a major in Nursing from Salve Regina College, nor will she be listed as such. Neither will she be listed nor recognized as an Alumni member of this particular program.

Her official transcript reflects both the Court Order and its reversal.

If I can be of further assistance, feel free to contact me.

Sincerely yours,
(Mrs.) Catherine E. Graziano
Acting Chairman
Department of Nursing

CEG:kl
Enclosure

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1192

SHEILA M. LYONS,
PETITIONER,

v.

SALVE REGINA COLLEGE and
SHEILA M. MEGLEY, PH.D., INDIVIDUALLY
AND IN HER CAPACITY AS DEAN OF STUDENTS
AT SALVE REGINA COLLEGE,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

PETER J. MCGINN
NORMAND G. BENOIT
TILLINGHAST, COLLINS & GRAHAM
2000 Hospital Trust Tower
Providence, Rhode Island 02903
(401) 274-3800
Attorneys for the Respondents

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

Table of Citations

Cases

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1192

SHEILA M. LYONS,
PETITIONER,

v.

SALVE REGINA COLLEGE and SHEILA M. MEGLEY, PH.D., INDIVIDUALLY AND IN HER CAPACITY AS DEAN OF STUDENTS AT SALVE REGINA COLLEGE,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Citation to Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 565 F.2d 200 (1st Cir. 1977). The opinion of the District Court of Rhode Island is reported at 422 F.Supp. 1354 (D.R.I. 1976).

Jurisdiction

Respondent does not question the jurisdiction as set forth in the Petition.

Constitutional Provisions, Statutes and Rules Involved

Jurisdiction in the federal courts was alleged by petitioner pursuant to 28 U.S.C. §1332 (1970), which provides in relevant part as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;"

28 U.S.C. §1332(a)(1).

The Questions Presented

This case presents the following questions:

1. Was the First Circuit Court of Appeals correct in refusing to employ isolated and selected statements by respondent Dean of Students to hold that Respondent College's formal written Grade Appeal Procedure in which the Grade Appeals Committee makes a "recommendation" to the Dean of Students was intended by the parties to bind absolutely the Dean of Students no matter how unreasonable the result and despite the fact the result was in contradiction to established College procedures?

2. Was the First Circuit Court of Appeals correct in concluding that the courts should not apply a rigorous commercial contract law standard of review in cases where it is alleged that a university or college breached a contract with a student based upon the contents of a student manual and where the alleged breach of contract involves good faith actions of school officials taken with respect to grading and internal review and appeals of grades?

Statement

On September 17, 1976, petitioner Sheila M. Lyons, a former student of respondent Salve Regina College and a graduate of the College with a major in psychology, filed an amended complaint with the District Court for Rhode Island. Her original complaint filed the same day sought to bring a 42 U.S.C. §1983 (1970) Civil Rights Action against respondent private College, but the amended complaint was brought solely on the basis of alleged diversity of citizenship and on a breach of contract theory. Petitioner principally sought to have the District Court order an "F" grade which she had received in Nursing 402A changed to an "Incomplete." Pursuant to Nursing Department rules at respondent College, as a result of receiving an "F" in Nursing 402A, petitioner could no longer continue her studies toward a degree in Nursing. Petitioner was allowed to switch her major and graduate with a psychology degree. Petitioner never sought reinstatement in the Nursing Department, an avenue potentially open to her, but simply filed suit over three months after her graduation for alleged breach of contract.

In her suit, petitioner asked the District Court to order reinstatement in the College for the purpose of obtaining a Nursing degree and sought money damages for breach of contract. The basis for her claim for relief was that respondent Sister Sheila Megley, the Dean of Students at the College, had breached a contract with petitioner by violating the applicable College procedures when the Dean did not follow the "recommendations" from two of three members of the College Grade Appeals Committee who had "recommended" that the grade be changed to an "Incomplete." The third member of the Committee had recommended affirmation of the grade of "F".

Following trial of the case, the District Court ordered a change of the grade of the petitioner from "F" to "Incomplete" and ordered reinstatement of the petitioner in the College with an opportunity to earn a major in Nursing. *See Lyons* v. *Salve Regina College*, 422 F.Supp. 1354 (D.R.I. 1976). The basis of the court's opinion was that although the College Manual and Academic Information Booklet provided that the Grade Appeals Committee recommend a course of action to the Dean of the College, the District Court found that based on the circumstances any such recommendation was "binding" upon the Dean. The District Court reached this unusual result by picking out selected conduct of Dean Sheila Megley to conclude essentially that recommend does not mean recommend.

Respondents appealed the District Court order and the Court of Appeals for the First Circuit unanimously reversed the District Court's decision. The Court of Appeals canvassed the entire lengthy record in this case and reasoned that

> "[t]here is nothing in the instant record to indicate that a student at Salve Regina College had any rational basis for believing that the word 'recommendation' meant anything other than its normal, everyday meaning." *Lyons* v. *Salve Regina College*, 565 F.2d 200, 202-03 (1st Cir. 1977).

The Court of Appeals simply held that the word "recommend" means "recommend", and there was no need to consider isolated and selected statements of the Dean of Students to attempt to impart some special meaning to the term. More importantly, the Court of Appeals recognized and applied the rule that the courts will not apply rigid commercial contract law doctrine when *academic* administrative appellate procedures are involved. Petitioner

pressed for a determination of damages in the District Court while the case was on appeal to the First Circuit but the District Court subsequently passed consideration of this question after the Court of Appeals' reversal.

Argument

I. Petitioner Has Not Demonstrated Why This Court Should Exercise Its Discretionary and Extraordinary Power To Issue a Writ of Certiorari.

Rule 19 of the Rules of this Court deals with considerations governing review on certiorari and provides in part as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling, nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> . . . .
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioner has not demonstrated in her petition why this Court should exercise its extraordinary and discretionary jurisdiction and issue a writ of certiorari in this case. This is a breach of contract case in the federal courts on the basis of diversity of citizenship jurisdiction. No federal questions are involved. Nevertheless, petitioner fails to indicate that an important state question has been decided in conflict with applicable state law, and petitioner does not demonstrate that the Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeals on the same questions. No reason articulated within Rule 19 of this Court's rules has been demonstrated by the petitioner in support of her request that a writ of certiorari be issued in this case.

In addition to the foregoing, petitioner herself recognizes in her brief that what she is requesting is a third-level review of the complex fact pattern which was developed below. On Page 7 of the petitioner's brief, she states: "[P]etitioner seeks only review of the narrow issue of whether or not, based on the factual issues presented, petitioner was entitled to relief as granted by the District Court." On Page 5 of her brief petitioner recites that "[t]his case involves questions of fact. . . ." This Court has observed and recognized by its actions on numerous occasions that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). A reading of the question presented by the petitioner and her argument in support of reasons for granting the writ of certiorari clearly indicates that the contract interpretation in this case turns entirely on the particular facts and circumstances surrounding the contract and its performance. Thus, the question presented by the petitioner is of particular interest only to the parties before it and does not present a case in which this Court should exercise its extraordinary prerogative to issue a writ of certiorari.

II. The Court of Appeals Clearly Did Not Err in Holding That the Term "Recommendation" Related to an Advisory Process and the Contract in the Form of the Student Manual Was Therefore Not Breached.

As the First Circuit Court of Appeals' decision indicates, the operative portion of the student manual which is the crux of the breach of contract controversy in this case was entitled "Grade Appeal Process" and provided that:

> "After both cases [the student's and the teacher's] are presented to the three-member grade appeals committee, the recommendation of the committee is made to the Dean of Students/Associate Dean of the College."
>
> *Lyons* v. *Salve Regina College*, 565 F.2d 200, 201 (1st Cir. 1977).

The three members of the Grade Appeals Committee made three different recommendations. Two members recommended that the student be allowed a grade of "Incomplete" and one member recommended that the "F" grade not be altered. The Court of Appeals, applying fundamental contract principles, saw no ambiguity in the term "recommendation" and held that the Dean of the College was not bound by the recommendations of the three members of the Committee.

This determination and the reasoning of the Court of Appeals was in accordance with the pronouncements of numerous other courts. This case involves judicial scrutiny of the actions taken by officials of a private college in the context of *academic* evaluation. Courts have been uniform in concluding that unless school authorities are motivated by malice or bad faith or act arbitrarily or capriciously, their acts in such situations are not subject to judicial review. *See, e.g., Connelly* v. *University of Vermont and*

State Agr. Col., 244 F. Supp. 156 (D. Vt. 1965). This rule of judicial non-interference with college or university officials in matters of academic decisions is based upon sound policy reasons. Courts are not equipped to review decisions based upon academic standards as these questions are particularly within the province, experience and expertise of academicians and administrators. *See Gaspar* v. *Bruton*, 513 F.2d 843, 851 (10th Cir. 1975). *See also Mahavongsanan* v. *Hall*, 529 F.2d 448 (5th Cir. 1976).

In contrast to the numerous cases holding that the decisions of school authorities in the academic context will only be reviewed for malice or bad faith or arbitrary or capricious action, the District Court in this case employed a technical, commercial contract law construction to the student manual and the conduct of the parties. Recognizing this error, the First Circuit Court of Appeals cited the Tenth Circuit case of *Slaughter* v. *Brigham Young University*, 514 F.2d 622 (10th Cir. 1975), where that court opined as follows:

> "The trial court's rigid application of commercial contract doctrine advanced by plaintiff was in error. . . . It is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the university to provide some framework into which to put the problem. . . . This does not mean that 'contract law' must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. . . . The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. . . ."
>
> *Lyons* v. *Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977), quoting, *Slaughter* v. *Brigham Young University*, 514 F.2d 622, 626 (10th Cir. 1975).

The correctness of the First Circuit's holding that the District Court erred in rigidly applying commercial contract law principles to construe the provisions of the student manual dealing with academic determinations is readily apparent in light of this Court's recent opinion in *Board of Curators of the University of Missouri* v. *Horowitz*, 46 U.S.L.W. 4179 (No. 76-695 March 1, 1978). The majority opinion there stressed the danger of "judicial intrusion into academic decisionmaking" [*id.* at 4183], and further observed that

> "[l]ike the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making."

Id. at 4182.

Thus, the First Circuit properly perceived the implications inherent in the District Court's rigid application of contract law principles to cases involving academic, as opposed to disciplinary, decision-making in the college or university context. If the District Court approach which petitioner urges were adopted, the courts would enter the academic thicket under the banner of "breach of contract." The very result and reasoning which the Court eschewed in *Board of Curators of the University of Missouri* v. *Horowitz, supra*, under the rubric of the due process clause would be imposed in "breach of contract" suits brought by students to contest academic determinations. Clearly, the First Circuit did not err in finding no breach of contract based upon the facts of this case and the legal standard of review applicable in breach of contract suits involving academic determinations.

Conclusion

For the reasons stated above, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

PETER J. MCGINN
NORMAND G. BENOIT
TILLINGHAST, COLLINS & GRAHAM
2000 Hospital Trust Tower
Providence, Rhode Island 02903
(401) 274-3800
Attorneys for the Respondents